

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

SUIT NO. 58 OF 2018

PURITY NJERI KATHENYA.....CLAIMANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1ST RESPONDENT

THARAKA NITHI COUNTY PUBLIC SERVICE BOARD....2ND RESPONDENT

RULING

1. The Claimant/Applicant seeks through the Notice of Motion Application dated 19th June 2018 the salaries withheld from September 2017 to date. The Claimant/Applicant seeks through her notice of motion *inter alia* for orders compelling the Respondents to pay her salary and allowances withheld from November 2017 and pending the hearing and determination of the suit, to be compelled to pay her all the outstanding salaries and allowances for the position held. The motion is supported by the Claimant's affidavit and grounds on the face of it. The Respondent is opposed to the grant of the orders sought in the notice of motion by the Claimant. Directions were given for the disposal of the motion through written submissions. Parties were to file submissions and this was done on 25th July 2018 by the Claimant and on 15th August 2018 by the Respondent.

2. It was the Claimant's submission that the 1st Respondent had no mandate to question the qualifications of the Claimant which is a preserve of the 2nd Respondent. It was asserted that the Claimant was appointed to her position upon competitive recruitment and she has not been suspended from employment neither was she removed from the payroll of the 1st Respondent. It was argued that withholding her salary while she is still in the employ of the Respondent is both unfair and unlawful. She relied on the holding of Radido J. in the case of **Simon Waringa Namakhabwa v Mr. Ajanta (Chairman) & Samanani Azam t/a Hoggers Limited [2018] eKLR** where the learned judge held that an employee is entitled as of right to earn wages and therefore by not *paying the Claimant the salary for March 2013, the Respondent was in breach of contract.*

The Claimant submitted that the withholding of her salary was unconscionable, illegal, null and void. She submitted that even in the case of suspension, which is not the case presently before this court an employee is still entitled to his/her salary. She thus submitted that she is entitled to the orders sought in her notice of motion application

3. In the submissions by the Respondents, it was argued that the Claimant was deemed to have admitted the assertions by the Respondents as she had not filed an affidavit to controvert what the Respondents had averred in their affidavit in opposition to her motion. Reliance was placed on the decision of **Standard Resource Group Ltd v Attorney General & 2 Others [2016] eKLR** for this position. The Respondent submitted that it was the practice of this court not to interfere with the exercise of the managerial prerogative as held in the cases of **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR** and **Rebecca Anne Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**. It was submitted that under Section 75 of the County Governments Act 2012 the 1st Respondent has power to review and revoke promotions and initiate corrective action including disciplinary process and that under Section 86 of the Act the 2nd Respondent can delegate its functions to the head human resources department, the county secretary and the chief officer of the 1st Respondent and others and therefore the internal disciplinary processes initiated against the employees are lawful. The ruling of Rika J. in **Prof. Gitile Naituli v University Council Multimedia University College & Another [2012] eKLR** was also relied on and it was submitted that the Employment Act did not intend to take away the managerial prerogatives of employers. Reliance was placed on the cases of **Giella v Cassman Brown (1973) E.A. 358** on the principles for the grant of an injunction as well as the case of **Kamau Muchuha v Ripples Ltd. Court of Appeal at Nairobi, Civil Application No. 126 of 1992** and **Shepherd Homes Ltd v Sandham (1971) Ch. 349** on mandatory injunction. It was argued that for the mandatory injunctions to be granted there must be clear and exceptional circumstances. The cases of **National Bank of Kenya v Duncan Owuor Shakali, Civil Appeal No. 9 of 1997** and **Eric V. J. Makokha & 4 Others v Lawrence Sagini & 2 Others [1994] eKLR** were also cited on injunctions. It was the Respondents position that the Claimant's case falls under the rule in **Mapis Investment (K) Ltd v Kenya Railways Corporation Court of Appeal at Nairobi Civil Appeal No. 14 of 2005** on the unenforceability of illegal contracts. The Respondent thus urged the dismissal of the Claimant's motion.

4. The Respondent cited the case of **Mapis Investment (K) Ltd v Kenya Railways Corporation** for the proposition that the court could not sanction the unenforceability of an illegal contract. The Respondents position on this is entirely erroneous in the context of the matter before me. This court is yet to hear the merits of the matter as to enable it to make a determination that the Claimant's contract is illegal so as to bring the enforcement of that contract within the purview of the rule in Mapis. The Claimant seeks the grant of injunctive relief and the principles in **Giella v Cassman Brown** are pertinent. The Claimant moved court for relief relating to her contract of service with the Respondent. That is a matter that is live before the court. The Claimant has to surmount the threshold in **Giella v Cassman Brown (supra)** to enjoy the relief sought. The principles that govern the grant of injunctive relief are well stated in the case of **East African Industries v Trufoods [1972] EA 420** which was cited with approval in the oft cited case of **Giella v Cassman Brown**. The 3 guiding principles laid out

are that an applicant who seeks a temporary injunction must show; firstly, a *prima facie* case with a probability of success; secondly, that failure to grant the temporary injunction sought would expose such an applicant to irreparable injury which injury would not be adequately compensated by an award of damages; and thirdly, that where a court is in doubt, it would decide the application on a balance of convenience. Put another way, the three-part test is that there must be an assessment of the merits of the case. I have to be satisfied that the claim is not frivolous and that there is at least a reasonable chance of success at trial. Secondly, the applicants must show that they would suffer irreparable harm in the context of the nature of the harm to be suffered not by the magnitude. Thirdly, if in doubt, I should use the balance of convenience, meaning that I have to assess who would suffer greater harm than the other and whoever would suffer greater harm would benefit as the scale would tilt in their favour. The Claimant was ostensibly dismissed in after the show cause in November 2017. If indeed she is entitled to relief, per the decision in **Giella v Cassman Brown**, she will be entitled to damages. Having considered all factors and on the basis of the foregoing, the court finds that the threshold for the grant of the injunctive remedy is not met. The Claimant's notice of motion application is therefore not fit for grant and the same dismissed albeit with no order as to costs.

It is so ordered.

Dated and delivered at Meru this 5th day of October 2018

Nzioki wa Makau

JUDGE